

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RYAN WAYNE ALLEN,

Appellant.

No. 37646-6-II

UNPUBLISHED OPINION

Houghton, P.J. — Ryan Allen appeals his conviction for two counts of unlawful possession of a firearm, arguing that the trial court erred in denying his motion to suppress evidence seized in an unlawful search. He further appeals his conviction for bail jumping, arguing that the bail jumping statute is impermissibly vague and that the State failed to give him proper notice of a hearing leading to his bail jumping charge. We affirm the unlawful possession conviction but reverse and remand with instructions to dismiss with prejudice the bail jumping conviction.

**FACTS**

Sometime past midnight on December 21, 2007, a Thurston County sheriff's deputy responded to a noise complaint. The deputy arrived at Allen's mobile home, located in an isolated area, from which the deputy heard music playing.

The music blared from Allen's mobile home so loudly that all the home's windows shook

and the deputy could not hear his dispatch radio even when turned up to its maximum volume. The deputy also noticed two cars parked in front of the home and a sign on the home that read, “No trespassing, violators will be shot and survivors will be prosecuted.” Clerk’s Papers (CP) at 30.

He knocked on the door twice before Allen answered. Allen aggressively opened the door while holding an assault rifle in his right hand. The deputy, who had come alone, stood face to face with Allen. The deputy later testified that it would have taken 10 to 20 minutes for assistance to arrive if he had called for backup.

The deputy ordered Allen to put down the weapon and Allen complied. The deputy pulled Allen out of the doorway and handcuffed him. The deputy asked Allen if any other persons presently occupied the home and if he had any other guns nearby. Allen answered that no one else was present and that he had a loaded .22 caliber rifle on his bed. The deputy entered the home, went into the bedroom, and secured the .22 caliber rifle.

The deputy radioed headquarters and learned that Allen had a previous felony conviction. As a result, Washington law forbade Allen from owning a gun. RCW 9A.040(1)(a). The deputy arrested Allen. The State charged Allen with two counts of first degree unlawful possession of a firearm: one count for the assault rifle, the other count for the .22 caliber rifle.

On December 21, 2007, pending Allen’s trial, the court released him on his personal recognizance on his complying with three conditions: (1) submitting to scheduled urinalysis and breath testing, (2) not possessing any weapon or firearm, and (3) appearing in court on three days’ notice from the State.

On Monday, February 11, 2008, at 1:07 p.m., the State filed a motion seeking revocation of Allen's conditional release because he had failed to submit to a scheduled urinalysis test. That same day the State mailed him a notice of the motion, setting the hearing for Thursday, February 14, 2008, at 9:15 a.m. Allen failed to appear at the hearing. The State then charged him with one count of bail jumping.

Before trial, Allen moved to suppress the .22 caliber rifle as evidence, claiming the deputy obtained it after an illegal search of Allen's home under the Washington and United States Constitutions. The trial court declined to suppress the evidence.

A jury found Allen guilty on both counts of unlawful firearm possession and for bail jumping. He appeals.

## ANALYSIS

### Unlawful Possession of a Firearm

Allen first contends that the trial court erred in denying his motion to suppress the .22 caliber rifle. He asserts that the deputy seized the .22 caliber rifle in a search impermissible under the Fourth Amendment and article I, section 7 of the Washington Constitution.

With certain exceptions, the federal and state constitutions prohibit warrantless searches and seizures. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). One such exception is for exigent circumstances requiring immediate action, such as officer safety. *Cardenas*, 146 Wn.2d at 405; *State v. Smith*, 137 Wn. App. 262, 268, 153 P.3d 199 (2007), *aff'd on other grounds*, 165 Wn.2d 511, 199 P.3d 386 (2009).

Allen argues that the deputy's entry to secure the .22 caliber rifle was constitutionally

prohibited because the deputy had no reason to be concerned for his safety. Because the deputy had taken away his assault rifle and because he had been handcuffed, Allen asserts the deputy had rendered him harmless.

To find exigent circumstances existed, the ground for an emergency search may not be merely pretextual. *Smith*, 137 Wn. App. at 269. An officer's belief that an emergency exists must be both subjectively and objectively reasonable. *Smith*, 137 Wn. App. at 269.

Under the subjective test, the deputy would be justified in relying on his own perception of any potential danger. Here, before knocking on Allen's door, the deputy observed a sign warning that trespassers would be shot, and Allen hurriedly opened the door with an assault rifle in hand. Both factors could have reasonably led the deputy to believe that Allen presented a potential, violent danger.

A more removed analysis of the situation also satisfies the objective test. The deputy testified that although Allen stated that no one else was in his home, he observed two cars in the driveway. The second car could have belonged to another potentially dangerous occupant with possible access to a weapon. Furthermore, because the deputy was alone and could not receive support from other deputies for some time, the deputy could have secured the .22 caliber rifle as a precaution in case Allen later attempted to escape or resist arrest. Allen's argument fails.

#### Bail Jumping

Allen further contends that his conviction for bail jumping must be reversed. He raises two arguments. First, that the bail jumping statute is impermissibly vague. Second, he argues that the State failed to give him the notice the trial court required when it imposed conditions for

his release pending trial. Therefore, he asserts, insufficient evidence supports his conviction. As the second argument disposes of this issue, we do not address his vagueness claim.

We review a claim based on insufficiency of the evidence under the familiar standard set forth in *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In doing so, we view the evidence in the light most favorable to the State to determine whether a rational fact finder could find the crime's essential elements beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

To prove that Allen committed bail jumping, the State had to show that with knowledge of the requirement of an upcoming appearance, he failed to appear "as required." RCW 9A.76.170. The trial court released him on his personal recognizance. One condition of release required him to "[a]pppear in court on three (3) days notice." Ex. 7. Another condition required him to report to the State for urinalysis tests. He did not report for urinalysis testing. In response, at 1:07 p.m. on Monday, February 11, the State filed a motion to revoke his release. The notice required him to appear in court on February 14 at 9:15 a.m.

Reviewing the relevant dates here, it becomes readily apparent that the State could not put a notice into the mail on Monday afternoon, February 11, and have Allen receive the required three days' notice of a 9:15 a.m. hearing on Thursday, February 14. At best, he would have had only two days' notice. The State simply did not give him the notice the trial court required, and he did not knowingly fail to appear. The State could not convict him for bail jumping under these circumstances. The conviction must be reversed and the matter remanded with instructions to dismiss. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (remedy is reverse and dismiss without retrial where insufficient evidence support an element of the crime).

Statement of Additional Grounds

Allen raises additional claims pro se in his statement of additional grounds.<sup>1</sup> His first claims appear to be that he received ineffective assistance of counsel.

An ineffective assistance of counsel claim requires a showing of deficient performance with resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Legitimate trial tactics and strategy form no basis for an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, we do not review matters outside the trial court record. *State v. McFarland*, 127 Wn. 2d 322, 335, 899 P.2d 1251 (1995).

Here, Allen's arguments revolve around asking his trial and appellate counsel to do certain things. First, Allen cites several legal authorities he requested his trial counsel present at trial. His trial counsel, Allen states, did not deem these authorities to be useful to Allen's case. The legal authorities cited by Allen in his statement of additional grounds, however, include civil or administrative laws which do not relate to Allen's criminal liability<sup>2</sup> and a single case pertaining to a municipal noise ordinance which does not relate to the State's charges of unlawful possession of a firearm. *City of Everett ex rel. Cattle v. Everett District Court*, 31 Wn. App. 319, 641 P.2d 714 (1982).

Second, Allen cites evidence he believes trial counsel should have introduced at trial, namely, testimony stating that Allen's gate was closed when the deputy arrived and that the

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<sup>1</sup> RAP 10.10(a).

<sup>2</sup> Allen cites chapter 10.36 RCW (no such chapter is presently enacted); chapter 70.107 RCW; chapter 173.53 WAC; WAC 173-58-040.

volume of the music coming from his house was less than 45 decibels. These claims comprise matters not related to the charges Allen faced, matters of trial tactics, or are outside the record. As Allen neither demonstrates deficient representation nor any prejudice, his ineffective assistance argument fails.

Next, Allen argues that he could not be convicted of unlawful possession of a firearm because the State did not notify him upon his prior release from prison that law forbade him from owning a gun. The statute under which he was convicted, however, does not require that the State to do so. RCW 9.41.040(1)(a). This argument fails.

Allen also asserts that the trial court incorrectly calculated his offender score. As he will be resentenced on remand, we do not address this argument further.

Finally, he raises claims based on the unlawful search and seizure and his bail jumping conviction. We otherwise addressed these same issues and, thus, do not discuss them further.

In summary, we affirm the unlawful possession of a firearm conviction and reverse and remand with instructions to dismiss the bail jumping conviction with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

No. 37646-6-II

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Bridgewater, J.

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Kulik, J.